KERAJAAN NEGERI SELANGOR

v.

MARAPUTRA SDN. BHD.

HIGH COURT MALAYA, SHAH ALAM
MAHADEV SHANKAR J
[ORIGINATING SUMMONS NO. 21-40 OF 1991]
3 APRIL 1991

ARBITRATION: *Arbitrator - Whether arbitrator can refuse to refer questions of law to the High Court - Arbitration Act 1950, s. 22(1).*

The respondent had entered into a contract with the State of Selangor (the State) in 1984 to lay steel pipes in the state (the works). The work was not completed within the stipulated time, due to a variety of causes, which resulted in the respondents incurring losses. The respondents blame the State for these losses and now seek their remedies through arbitration. In the course of the arbitration, the State asked the arbitrator to refer two questions of law to the High Court.

After hearing submissions, however, the arbitrator refused to refer the questions to the Court. The State now makes this application to the Court under s. 22(1) of the Arbitration Act 1950. The respondents objected to the application.

Held :

[1] There is nothing in the terms of reference in this case which enables the arbitrator to refuse making the reference. Even if there is such a provision, it is ineffective because the statute overrides the contract.

[2] The Court will not direct the arbitrator to state a case for reference to the Court merely because he has refused to do so. The question of law on which the Court's decision is sought must be material to the issues in dispute and is one which the Court must decide having regard to all the circumstances of the case.

[3] Care should be taken that an order directing the statement of a special case must be "in the course of the reference". It cannot be done after the award has been made.

[4] Having regard to the facts of this case, the Court orders that the arbitrator proceed with the arbitration proceeding and make his finding as to whether the respondent had suffered any loss. The State shall thereafter be at liberty to request the arbitrator to reformulate the legal issues raised for the determination of the Court. Unless otherwise agreed by both the parties, the arbitrator shall not pronounce his final award without the leave of the Court.

[Application adjourned sine die.]

Cases referred to:
Hansloh and Reinhold [1895] 1 Com Cas 215 ***(cit)***
Czarnaikow v. Roth, Schmidt & Co. [1922] 2 KB 478 ***(cit)***

Legislation referred to:
Arbitration Act 1950, s. 22(1)
Street, Drainage and Building Act 1974, s. 40

Other source referred to:
Laws of England, Halsbury's 4th Edn., para. 602 note 4

For the respondent - Selva; M/s. Raj, Selva & Co.
For the defendant - Hasnah (Sallehudin with him)

JUDGMENT

Mahadev Shankar J:

For a tender sum of about RM4.1 million. Maraputra Sdn. Bhd. (Maraputra) entered into a contract, in 1984, with the Government of the State of Selangor (the State) to lay steel pipes for the Sungei Semenyih Water Supply Scheme (the works). The contractual period for completion of the works was twelve months.

The works were not completed on time. Maraputra attributes this to a variety of causes which resulted in alleged financial losses in the order of RM5.5 million.

Maraputra blames the State for these losses and seeks recovery by arbitration.

One of these causes was the insistence of the Dewan Bandaraya Kuala Lumpur (DBKL) that before a work permit could be issued, a sum of RM42 per square metre be deposited for reinstatement of road surfaces. The state contended that Maraputra disputed this. It alleged that the amount demanded was unreasonable and challenged it. Eventually, Maraputra made the deposits but under protest. Maraputra says it did so by reason of a misrepresentation by the state engineer that it was obliged to make the payments. The delay caused in the resolution of this problem and the consequential losses flowing therefrom is one of Maraputra's heads of claim.

In the course of the arbitration the state called upon the arbitrator to refer two questions of law in the form of a special case for the decision of the High Court. These questions were jointly drafted by the parties as follows:

1. Whether the amount imposed by Dewan Bandaraya Kuala Lumpur (hereinafter referred to as "DBKL") for reinstatement of roads and road verges by virtue of s. 40 of the *Street, Drainage and Building Act* [1974] is illegal in the absence of a by-law, regulation or rules made under the said Act; and
2. if it is illegal then, whether the claimant's claim for:
   (a) any amount paid to DBKL should be made against DBKL instead of the respondent and,
   (b) whether any claim for, solely because of the collection of such amounts by DBKL, loss suffered as alleged by the claimant should be against DBKL and not against the respondent

After hearing submissions the arbitrator declined to make the reference. He gave his reasons by letter dated 3 November 1990.

So the state made this application under s. 22(1) of the Arbitration Act 1950. It reads:

> 22.(1) An Arbitrator or umpire may, and shall if directed by the High Court state:
>
> (a) any question of law arising in the course of the reference; or
>
> (b) an award or any part of an award,
>
> in the form of a special case for the decision of the High Court.

Clause 6.1 of the terms of reference provided that the arbitrator shall have power:

to determine any question of law or fact arising in the arbitration without prejudice to the arbitrator's power to refer any points of law to the High Court if he so desires.

Maraputra's Counsel submits that the state cannot come to Court under s. 22(1). This is clearly misconceived. I cannot see anything in Clause 6.1 which gives the arbitrator such immunity. If it did it is ineffective; because the statute overrides the contract: See *The Hansloh and Reinhold* [1895] 1 Com Cas 215; *Czarnaikow v. Roth, Schmidt & Co.* [1922] 2 KB 478.

But the Court will not direct the arbitrator to state a case merely because he has refused. The second prerequisite is that the question of law on which the Court's decision is sought is material to the issues and is one which the Court must decide having regard to all the circumstances of the case.

Applications have therefore gone both ways. See the cases listed in *Halsbury's Laws of England* 4th Edn., para. 602 note 4.

But care should be taken to note that an order directing the statement of a special must be "in the course of the reference". It cannot be done after the award has been made. (See cases listed in *Halsbury ibid* note 6.)

Because the DBKL had refunded the deposits made by Maraputra it was submitted by Maraputra to the arbitrator that it was no longer necessary to decide the first question. Had this been the only question the arbitrator says he would have agreed, but he held nevertheless that it was relevant in conjunction with the second question.

But the acts of the DBKL in insisting upon the deposits were only a part of a much wider series of events which combined to produce Maraputra's misfortunes. The arbitrator says that if he ultimately finds that Maraputra had not suffered loss solely because of the DBKL's collections, it would be pointless to refer the question to the Court. In the event of a contrary finding the arbitrator says that the factual findings would assist in a more precise formulation of the legal issues.

I would respectfully agree that this approach is both pragmatic and reasonable subject to the caveat that the right of state to have both questions of law decided by this Court should not be pre-empted by the prior conclusion of the award.

Consequently I ordered that the arbitrator shall give express prior notice of his findings of fact as to whether Maraputra have suffered any loss arising out of or in any way incidental to the collection of the aforesaid deposits by the DBKL. The State Government shall thereupon be at liberty to request the arbitrator to reformulate the legal issues raised herein for the determination of this Court and apply for the originating summons to be relisted for disposal of the questions, as amended, if need be. Such request and application shall be made within four weeks of receipt of the arbitrator's notice as aforesaid. Unless otherwise expressly agreed by both parties in writing the arbitrator shall not pronounce his final award without the leave of this Court first had and obtained.

For these reasons I hereby order:

(1) that this application be adjourned *sine die;*

(2) that the Arbitration do proceed but the arbitrator shall give both parties prior written notice of his findings of fact as to whether Maraputra Sdn. Bhd. have suffered any loss arising out of or in any way incidental to the collection by the DBKL of RM42 p/sm as deposits for reinstatement of road surfaces;

(3) that within four weeks of receipt of such notice the Kerajaan Negeri Selangor shall be at liberty to apply to restore this application for hearing for an order in terms of this application or for such amended questions of law as considered desirable by the parties and/or such further or other order as the justice of the case requires;

(4) that the arbitrator shall not pronounce his final award without a direction of this Court first had and obtained as to whether he is required to state his award or any part thereof in the form of a special case;

(5) that the costs of this application be reserved and dealt with on the final disposal of this application.

I also certify that I do not require any further argument in this case so the order is a final order for purposes of an appeal, if any, to the Supreme Court.

Also found at [1992] 1 CLJ 441